Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

JEFFERY MARTIN GREER,
PETITIONER,

VS.

THE STATE OF TEXAS,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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FIRST QUESTION PRESENTED FOR REVIEW

THE COURT OF APPEALS VIOLATED THE DUE PROCESS CLAUSE OF THE U.S CONSTITUTION BY LOWERING THE STANDARD OF REVIEW FROM PREPONDERANCE OF THE EVIDENCE TO EVIDENCE SLIM AT BEST

SECOND QUESTION PRESENTED FOR REVIEW

DOES THE COURT OF APPEALS VIOLATE THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION FINDING THAT THE HEARSAY TESTIMONY OF A WITNESS IS ADMISSIBLE AND DOES NOT VIOLATE PETITIONERS RIGHT TO CONFRONT THE WITNESS

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Petitioner respectfully requests that a Writ of Certiorari issue to the Court of Appeals for the Fourteenth Appellate District of Texas at Houston, Texas, to permit this Honorable Court to review the decision and judgment of Jeffery Martin Greer vs. The State of Texas Cause Number Appellate Number 14-97- 639-CR appealed from the 232nd District Court of Harris County Texas Trial Cause Number 97-03-00496.

DECISION BELOW

Petitioner was indicted under the TEX. PENAL CODE 22.11 Vernons 1993 for the offense of indecency with a child. Petitioner was placed on probation for the offense in September 9, of 1992.

On May 22, 1998 the Petitioner entered a plea of not true to alleged violations of his probation. The trial judge after hearing evidence found the Petitioner guilty and assessed punishment at ten (10) years in the Institutional Division of the Texas Department of Corrections.

The Fourteenth Court of Appeals affirmed Petitioner's case on July 29, 1999. Motion for Rehearing was filed and denied. Petitioner petitioned for Discretionary Review to the Texas Court of Criminal Appeals and was refused on April 18, 2000.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. Sec. 1257(a) providing jurisdiction to review "final judgments.... rendered by the highest Court of a State in which a decision could be had....by Writ of Certiorari, when any title, right, privilege, or immunity is specifically set up or claimed under the Constitution ... of the United States."

Petitioner's U.S. Const. 14th Amendment Due Process rights were violated by the Court of Appeals in establishing a standard of review inconsistent with the standard burden of proof used to review a motion to revoke probations. The Court of Appeals found that the evidence was "slim at best" This denies the Petitioner due process, is inconsistent with the standard of review of abuse of discretion, and lowers the States

burden below that established of preponderance of the evidence.

In Petitioner's second point of review, the Sixth Amendment to the United States Constitution was violated by admitting hearsay testimony of a probation officer in concluding that the Petitioner had violated his probation by not finding a notation in the probation file that the Petitioner had reported for the month of June, 1996.

This petition is timely filed, by placing it in the United States mail on or before July 18, 2000.

CONSTITUTIONAL PROVISIONS AT ISSUE

Two constitutional provisions forms the basis for Petitioners' contentions:

U.S. Const. Amend VI

.... to be confronted with the witnesses against him...
Const. Amend XIV.

Nor shall any State deprive any person of life, liberty, or property, without due process of law.....

PERTINENT TEXAS LAW POINT OF ERROR NUMBER ONE

The State of Texas through its Courts have consistently held that the review of a motion to revoke probation hearing is whether or not there was an abuse of discretion in the trial court. *Flournoy v. State*, 589 S.W.2d 705, 708 (Tex.Cr.App.1979). The Courts have also consistently held that the burden of proof in a community supervision revocation hearing is by a preponderance of the evidence. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex.Cr.App.1984)

The Due Process Clause of the Texas Constitution Article One Section 19 guarantees each individual the right to a fair hearing and requires the State of Texas to present competent evidence against the Defendant.

The Due Process Clause and the cases setting out the standards for review of Motion to revoke probation in the Court of appeals have been violated by the Court of Appeals setting a Standard indicating that little or no evidence is sufficient to send an individual to the penitentiary in the State of Texas.

PERTINENT TEXAS LAW POINT OF ERROR NUMBER TWO

The essential policy underlying the Sixth Amendment right to confrontation is to give the accused an opportunity to cross-examine the witness against him *Pointer v. Texas*, 380 U. S. 403; 85 S.Ct. 1065, 23 L.Ed. 2d. 923 (1965).

CONCISE STATEMENT OF THE CASE

This appeal comes from a motion to revoke probation hearing held May 22, 1997. The Petitioner was placed on probation on September 9, 1992 for the offense of indecency with a child TEX PENAL CODE 22.11 (Vernons 1992) (CR-44).

On May 9, 1997 the First Amended Motion to Revoke Probation was filed. A hearing was held on May 22, 1997. Probation was revoked and Appellant was sentenced to 10 years in the Texas Department of Corrections Institutional Division. Appellant gave timely written notice of appeal on May 22, 1997.

The Fourteenth Court of Appeals affirmed the conviction on July 29, 1999. The Texas Court of Criminal Appeals denied a hearing on Petitioner for Discretionary Review on April 19, 2000. This writ is due on or before July 18, 2000.

Questions Raised and Rejected in Courts Below Point of review number one

Petitioner claims that he was denied the federal protection of the United States Constitution due process of law by having his probation revoked when the evidence at the trial level that was upheld by the Fourteenth Court of Appeals was "slim at best". The evidence against the Petitioner consisted of an individual who testified that he was not the probation officer and was unable to say for sure that the Petitioner had not reported as alleged in the Motion to Revoke his Probation.

Facts Material to the Question Presented Point of Review number Two

The probation officer, Franklin Emeka, testified at the Motion to revoke hearing that he was the current probation officer for the Appellant. He was not the probation officer in June 1996, the date the probation officer was alleged not to have reported.

Mr. Emeka testified from notes in the file the Appellate did not report on June 13, 1996. He also stated that Terri Adams was the probation officer for the Appellant during the months of June and July 1996.

The trial attorney inquired if the file was ever transferred to the Court for an early termination proceeding? Mr. Emeka testified that the file was transferred on June 13, 1996 and was returned on June 24, 1996.

The file did not reflect that the Appellant reported in the month of June 1996. The file did reflect the Appellant reported the next month July 3, 1996. However under cross examination, Mr. Emeka testified it was possible that a notation might not be made on the file and the Appellant might have reported on June 13, 1996. (RR Vol I. P. 36).

On redirect the prosecution asked:

Q: If the Defendant reported without the file being present is it likely the file would have reflected that?

A: Yes, ma'am

The file was not in the possession of the probation officer for the month of June at the time the Appellant was to report. When the file was returned to the probation department from the Court on June 24, 1996, the file reflects a payment was made for his supervisory fees. (RR Vol I. P.44) The Appellant had been reporting every month for 5 years and had been progressing in his treatment.

FIRST QUESTION PRESENTED FOR REVIEW

DOES THE COURT OF APPEALS VIOLATE THE DUE PROCESS CLAUSE OF THE U.S CONSTITUTION BY LOWERING THE STANDARD OF REVIEW FROM PREPONDERANCE OF THE EVIDENCE TO EVIDENCE "SLIM AT BEST."

SECOND QUESTION PRESENTED FOR REVIEW

DOES THE COURT OF APPEALS VIOLATE THE 6TH AMENDMENT TO THE UNITED STATES CONSTITUTION FINDING THAT THE HEARSAY TESTIMONY OF A WITNESS IS ADMISSIBLE AND DOES NOT VIOLATE PETITIONERS RIGHT TO CONFRONT THE WITNESS

REASONS FOR GRANTING REVIEW OF QUESTIONS ONE

THE TEXAS COURT OF CRIMINAL APPEALS REFUSAL TO HEAR THE CONSTITUTIONAL COMPLAINTS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT. U.S.S.CT.R. 10(c).

The Court of Appeals in holding that it was "slim evidence at best" lowered the standard of review on a motion to revoke probation a violation of United States Constitution 14th Amendment due process clause in lessening the burden of the State.

ARGUMENT AND AUTHORITIES

Texas law provides that the only question properly before a Court of Appeals on a community supervision revocation proceeding is whether or not there was an abuse of discretion in the trial court. *Flournoy v. State*, 589 S.W.2d 705,

708 (Tex.Cr.App.1979). The burden of proof in a community supervision revocation hearing is by a preponderance of the evidence. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex.Cr.App.1984); *Sterling v. State*, 791 S.W.2d 274, 277 (Tex.App.--Corpus Christi 1990, pet. ref'd). When there is sufficient evidence to support a finding that a condition of community supervision has been violated by the probationer, the trial court does not abuse its discretion in revoking community supervision. *Cardona*, 665 S.W.2d 492; *Stevens v. State*, 900 S.W.2d 348 (Tex.App.--Texarkana 1995, pet. ref'd). Moreover, proof of *any* alleged violation of a condition of community supervision is sufficient to support revocation of community supervision. *Moses v. State*, 590 S.W.2d 469, 470 (Tex.Cr.App.1979); *Burns v. State*, 835 S.W.2d 733 (Tex.App.--Corpus Christi 1992, pet. ref'd); *Webb v. State*, 757 S.W.2d 830 (Tex.App.--Texarkana 1988, pet. ref'd).

In Petitioner's case, the evidence ruled by the Court of Appeals was "Slim at best". The Court of Appeals correctly states that the Trial Court must find the evidence by a preponderance of the evidence, the question that is presented is does the Court of Appeals correctly hold the State of Texas to that burden or have they lessened the burden to be "slim at best.

The evidence did also not fit into the preponderance of evidence test when the probation officer testified

(1) That the file on June 13, 1996 was in the Court for consideration for Early Termination. He also testified under cross examination that it is possible that the Appellant did report on June 13, 1996.

Therefore, there is insufficient evidence to tip the scales in favor of the Judges decision as is required under the preponderance of Evidence Rule.

Based on this evidence the Defendant was denied equal Justice under the Law, and the Court abused it's decision by lessening the States burden of proof as required by the Law.

REASON FOR GRANTING REVIEW OF QUESTION TWO

THE TEXAS COURT OF CRIMINAL APPEALS REFUSAL TO HEAR THE CONSTITUTIONAL COMPLAINTS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT. U.S.S.CT.R. 10(c).

ARGUMENTS AND AUTHORITIES

In his brief to the Court of Appeals, counsel explained to the Honorable Court that the 6th Amendment to the United States Constitution provides the Petitioner with the right to confront the witnesses against him. The witness, who was the probation officer, and responsible for the file in the month of June, 1996, the month the allegation was made, failed to testify.

The allegation that Petitioner did not report for the Month of June and made the basis for the final revocation of the Petitioner, was due to no notation in the file that Defendant did report by Ms. Terri Adams. Mr. Emeka testified from the file and indicated that there was not a showing that the Petitioner had reported for the one month, nor was there a notation that Defendant did not report. There was further evidence that the file where the notation would be made, was not in the possession of either Mr. Emeka or Ms Adams during the month of June but had been taken to the Court Room for early release to be considered. Therefore, the Petitioner's file was not available in the probation office for a notation to be made in it at the time Petitioner would have reported.

Mr. Emeka, the probation officer, testified that the Appellant did not report for the month of June. This information came from the probation file. Mr. Emeka was not the probation officer at the time of this alleged violation. He was testifying from the file. Not from his own personal knowledge and thus it was hearsay.

The State presented this testimony under an exception to the hearsay rule 803(6) business records act. The witness was qualified as a custodian of records

Hearsay is any out-of-court statement offered in evidence to prove the truth of the matter asserted. TEX.R.CRIM. EVID. 801(d). The testimony from the probation officer was clearly hearsay and it was offered to prove the truth of the matter asserted, i.e., that the Appellant did not report for the month of June, 1996. Therefore, to be admissible it must fall under one of the exceptions to the hearsay rule.

The State argues that the report falls under the exception for records of regularly conducted activity, however, since the file was not in the probation office during the time the Petitioner would have reported there can be no regularly conducted exception to the hearsay rule. TEX.R.CRIM. EVID. 803(6). Evidence admissible under this rule, however, may still be inadmissible if it does not meet the requirements of TEX.R.CRIM. EVID. 803(8). In other words, if a public record is inadmissable against a Defendant due to the limitations of Rule 803(8)(B) or (C), then the record may not alternatively be admitted under Rule 803(6) even though all the requirements are met. *Cole v. State,* 839 S.W.2d 798 (Tex.Crim.App.1990).

The public records and reports exception (Rule 803(8) allows the admission in evidence of records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel, or (C) against the State, factual findings resulting from an investigation made pursuant to authority granted by law.

The Court may look to federal cases that interpret the Federal Rules of Evidence for guidance as to the scope and applicability of the Texas Rules of Criminal Evidence because our rules were patterned after the federal rules. **Cole v. State**, 839 S.W.2d at 801. Also, because Texas Rule of Criminal Evidence 803(8) is worded almost identically to its federal counterpart, Texas courts weigh federal precedent more heavily in applying this exception. *Id.* at 801-02.

The type of information the State was allowed to admit was that information that was set forth in a public record or report is a matter observed pursuant to a duty imposed by law

and a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel. TEX.R.CRIM. EVID. 803(8)(b).

Rule 803(8)(b) has a specific circumstance when official reports are not admissible. The report is not admissible if it contains matters observed by police officers and other law enforcement personnel. TEX.R.CRIM. EVID. 803(8)(b). This limitation is based on the presumption that observations by an officer at a scene of a crime are not as reliable as observations by other public officials. *United States v. Ware*, 247 F.2d 698, 700 (7th Cir.1957). This is due to the adversarial nature of the confrontation between the Defendant and the police in the criminal context. *Id.*

The Court uses a two-prong test to determine whether the probation officer is considered "other law enforcement personnel." *Garcia v. State*, 868 S.W.2d at 337 (Tex. Crim. App. 1993) First, a court should consider whether the report is an objective, routine, determination of unambiguous facts prepared by an official with no inherent motivation to distort the results. *Id.* at 341. Further, the subjective degree of the report should be considered in determining whether the official had a motive to distort the report's results. *Id.*

Second, the adversarial context in which the report was prepared should be considered in determining the admissibility of that report. *Id.* at 342.

It is clear that the probation officer is in an adversarial position. The report is suppose to be an objective determination of unambiguous facts but it is clear that many officers could be motivated to distort the results. A probation officer is not similar to the situation a medical examiner is placed in when testifying. The officer is testifying directly on issues that could show by the preponderance of the evidence whether an individual violated his or her probation. The position is similar to a police officer testifying on the facts of an arrest. A probation officer that does not make the notation in the file should not be allowed to testify concerning what another probation officer did or did not do, especially when the probation officer testifies the file was not in the possession of the probation office at the time the entry of Petitioner's reporting should have been made. Mr. Emeka, testified from his experience as a probation officer, that the lack

of a notation could have been the result of the file not being in the probation office.

To further show the testifying probation officer's testimony was unreliable and subject to error is his testimony that the Petitioner made a payment the very day he was to report which was evidence by a receipt from the financial section of the probation department, further showing inconsistences in the file.

It is requested that the Honorable Court hold that the testimony was hearsay and unreliable and should not have been admitted and violated the United States Constitution 6th Amendment and does not meet the requirements of a preponderance of the evidence.

CONCLUSION

WHEREFORE PREMISES CONSIDERED, Petitioner respectfully pray that the Court grant his petition and issue a Writ of Certiorari to the Court of Appeals Fourteenth District to review the question here presented.

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APPENDIX A

Affirmed and Opinion filed July 29, 1999.

In The
Fourteenth Court of Appeals

NO. 14-97-00639-CR

JEFFERY MARTIN GREER, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the 232nd District Court
Harris County, Texas
Trial Court Cause No. 637100

OPINION

Appellant, Jeffery Martin Greer, appeals the trial court's revocation of his probation. On September 9, 1992, the 182nd District Court sentenced appellant to probation for the offense of indecency with a child. Pursuant to this probation, appellant signed a document outlining the conditions of his probation. On April 12, 1996, Judge Barr, a former prosecutor in the 182nd Judicial District at the time appellant received probation, modified these conditions. Judge Barr added a condition prohibiting appellant from having contact with minors.

One condition of probation required appellant to participate in a treatment program for sex offenders. In order to advance to the next level of treatment, appellant was obligated to submit to a polygraph examination. During the

pre-test interview, appellant admitted to the examiner that he had contact with minors and possessed child pornography via the Internet. Based on this information, the State filed a motion to revoke probation, alleging that appellant failed to comply with the conditions of his probation; specifically, appellant failed to report to his probation officer in June of 1996 and had contact with a minor. Judge Barr signed this motion on April 17, 1997. In response, appellant filed a motion to quash, asserting, *inter alia*, that the condition added by Judge Barr was improperly imposed, having been set by a judge who was previously a prosecutor on the case. Subsequently, Judge Barr transferred the case to the 232nd District Court with the latter's consent.

In its first amended motion to revoke, the State added an allegation claiming appellant committed an offense in violation of the laws of the State, namely, possession of child pornography via the Internet. After a hearing on the motion, the trial court found each allegation to be true, revoked appellant's probation, and sentenced appellant to ten years' imprisonment.

In eight points of error, appellant challenges the sufficiency of the evidence and contends the trial court erred in: (1) denying his motion to quash; (2) transferring his case to the 232nd District Court; (3) allowing testimony from a polygraph examiner when the examiner failed to Mirandize appellant; (4) admitting evidence concerning the existence and result of a polygraph examination; and (5) permitting hearsay testimony. We affirm.

STANDARD OF REVIEW

A proceeding to revoke probation is not criminal or civil, but rather an administrative proceeding. *See Cobb v. State*, 851 S.W.2d 871, 873 (TEX. CRIM.APP. 1993); *Burke*

v. State, 930 S.W.2d 230, 232 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd). In a probation revocation hearing, the State must prove by a preponderance of the evidence that the defendant violated a condition of his probation. *See id.* Proof of a single violation is sufficient to support a revocation. *See id.*

Appellate review of the evidence is limited to determinng whether the trial court abused its discretion in revoking the defendant's probation. *See id.* In conducting this review, the appellate court will view the evidence in the light most favorable to the trial court's order. *See id.* The trial court is the exclusive judge of the credibility of the witnessess and determines if the allegations in the motion are sufficiently demonstrated. *See id. Galvan v. State*, 846 S.W.2d 161, 162 (Tex. App.—Houston [1st Dist.] 1993, no pet.).

SUFFICIENCY OF THE EVIDENCE

In his sixth point of error, appellant challenges the sufficiency of the evidence to support revocation. In the State's amended motion to revoke, the State alleged three violations of the terms and conditions of probation: (1) appellant possessed child pornography; (2) appellant failed to report to his probation officer in June of 1996; and (3) appellant had contact with minors. Appellant contends the evidence does not support these allegations.

a. Possession of Child Pornography

The State's motion to revoke probation alleged that appellant committed an offense against the laws of the State, namely, possession of child pornography. Appellant asserts, however, that the evidence is insufficient to support revocation on this particular allegation because the evidence

presented did not establish appellant committed an offense against the laws of the State. We agree.

Section 43.26 of the Penal Code prohibits a person from knowingly "possessing visual material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct." TEX. PEN. CODE ANN.§ 43.26 (Vernon Supp. 1999). Visual material is defined in the code to encompass any disk, diskette, or other physical medium that allows an image to be displayed on a computer. *See id.* This statute came into effect on September 1, 1997. *See* Act of May 23, 1997, 75th Leg., R.S., ch 933, § 1, 1997 Tex. Gen. Laws 2931, 2932.

In the present case, the record reflects appellant possessed child pornography via the Internet between the months of February and March of 1997. At the time, it was a crime to knowingly possess materials containing a *film image* of child pornography. *See* TEX. PEN. CODE ANN. § 43.26 (Vernon 1994). "Film image" included a photograph, slide, negative, film,or videotape. *See id.* § 43.26(b)(1). The statute did not proscribe the possession of child pornography via the Internet. As a consequence, appellant's action was not an offense against the laws of the State. Therefore, there is no evidence supporting revocation on the State's allegation that appellant committed an offense in violation of the laws of the State.

b. Contact with Minors

In the interest of brevity, we will address appellant's first point of error simultaneously with his sufficiency challenge. In his first point of error, appellant contends that the trial court erred in failing to quash that portion of the State's motion to revoke probation that alleged a violation of

the condition prohibiting him from having contact with minors. On April 12, 1996, Judge Barr, a former prosecutor for the 182nd District Court, modified appellant's conditions of probation by adding a provision prohibiting appellant from having contact with minors. Appellant argues this condition is void because it was ordered by a disqualified judge. We agree.

A judge is prohibited by the Texas Constitution and by statute from sitting in any case where she has been counsel. *See* Tex. Const. art. V, § 11; TEX. CODE CRIM. PROC. ANN. art. 30.01 (Vernon Supp. 1999). The disqualification of a judge may not be waived by consent of the parties, and the issue may be raised at any time. *See Gamez v. State*, 737 S.W.2d 315, 318 (Tex. Crim. App. 1987). Any act by a disqualified judge is a nullity. *See Davis v. State*, 956 S.W.2d 555,558,559 (Tex. Crim. App. 1997).

The record in the present case reveals that after the State's motion was filed and signed by Judge Barr, she recused herself and ordered the case to be transferred to the 232nd District Court.[1] Judge Barr noted on the transfer order that "[defendant] rec's prob. in 182nd—Judge

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[1] In a related point of error (point of error two), appellant claims the trial court erred in transferring his case to the 232nd District Court in violation of article 42.12, section 10 of the Code of Criminal Procedure. Appellant contends that the administrative judge of the 182nd court should have appointed a special judge to hear the allegations contained in the State's motion, rather than transferring the case to the 232nd court. Article 42.12, section 10, however, provides that the court in which a defendant was tried may transfer jurisdiction of the case to another court with the latter's consent. *See* TEX.CODE CRIM. PROC. ANN. art. 42.12, § 10 (Vernon Supp. 1999). In the present case, the 182nd court obtained the consent of the 232nd court, therefore, the transfer was proper. Consequently, appellant's second point of error is overruled.

prosecutor;" the record is otherwise silent regarding Judge Barr's involvement in the underlying case. Consequently, we can only infer from these facts that Judge Barr was a prosecutor for the 182nd Judicial District at the time appellant received probation in the same court; thus, Judge Barr was disqualified from hearing the State's motion to revoke. Therefore, any action taken by Judge Barr regarding appellant's probation is void. As a result, the trial court erred in failing to quash that portion of the State's motion alleging that appellant violated his probation by having contact with a minor. Accordingly, we sustain appellant's first point of error. Further, because we have concluded that the condition is void, we need not address whether the evidence is sufficient to support the trial court's order to revoke on that ground.[2]

c. Failure to Report

Appellant next challenges the sufficiency of the evidence to support revocation on the State's last allegation,

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[2] Pursuant to our ruling on point of error one, we also need not address the merits of appellant's third, fourth and fifth points of error. In his fifth point of error, appellant argues that the trial court erred in admitting testimony concerning the existence and results of a polygraph examination. Specifically, appellant asserts that the relevant evidence was derived from his admission during a pre-test interview of having contact with minors. According to appellant, this testimony was inadmissible under the rules prohibiting the admission of evidence regarding the existence or results of a polygraph examination. In his third point of error, appellant contends the trial court erred in admitting the polygraph examiner's testimony because the examiner failed to give appellant Miranda warnings. Point of error four complains that testimony from the polygraph examiner should have been excluded under TEX. R. EVID. 510. However, because this condition is void, evidence regarding appellant's alleged violation is moot. Therefore, whether the trial court erred in admitting testimony from the polygraph examiner is no longer an issue.

appellant's failure to report to his probation officer in June 1996. In related arguments, points of error seven and eight, appellant argues his probation officer's testimony, which was derived from his probation file, was admitted in violation of TEX. R. EVID. 803(8)(B) and the Sixth Amendment of the United States Constitution. Again, in the interest of brevity, we will address these points together.[3]

At the hearing, the State elicited testimony from appellant's probation officer regarding appellant's alleged failure to report in June 1996. However, the witness was not the probation officer in charge of appellant's case at the time of the alleged violation and his testimony was, therefore, limited to interpreting the contents of appellant's probation file.[4] The State tendered this evidence under rule 803(6), which provides an exception to the hearsay rule for records kept in the course of a regularly conducted business activity. Notwithstanding, appellant asserts that evidence admissible under rule 803(6) may still be inadmissible if it fails to meet the requirement of rule 803(8)(B).

Rule 803 provides:

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[3] In his eighth point of error, appellant contends the trial court erred in admitting the hearsay testimony of his probation officer in violation of his Sixth Amendment right to confront witnesses. However, appellant has failed to adequately brief the court on this point, and has waived error. *See* TEX. R. APP. P. 38.1(h).

[4] The probation records contained an entry indicating that appellant failed to report as scheduled on June 13, 1996. No reason was provided for appellant's failure to report and appellant did not report in the entire month of June. On cross-examination, the witness was asked if, although no notation was made in the file, appellant could have reported. The witness stated, "Anything is possible." The file showed appellant did report on July 3, 1996.

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
>
> . . . .
>
> (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding in criminal cases matters observed by police officers and other law enforcement personnel*
>
> ....

TEX. R, EVID. 803(8)(B) (emphasis added). Appellant contends that rules 803(6) and 803(8)(B) have been interpreted by the Court of Criminal Appeals in *Cole v. State*, 839 S.W.2d 798 (Tex. Crim. App. 1990, in such a way that reports not satisfying the standards of rule 803(8)(B) may not qualify for admission under rule 803(6). In *Cole*, the State sought to introduce hearsay statement contained in letter reports from a chemist employed by the Texas Department of Public Safety (DPS). *See id* at 800. In the reports, the chemist disclosed the results of tests conducted upon physical evidence collected at the medical examination of the sexual assault victim. *See id*. In the absence of the chemist, the supervising chemist with the same DPS laboratory was allowed to testify over appellant's hearsay objection as to the tests conducted and the results of the tests shown in the reports. *See id*. The State tendered the evidence under rule 803(6) *See id*. Appellant contended that the admission of the hearsay statement of the chemist through his supervisor's testimony was in contravention of rule 803(8)(B), which prohibits as hearsay "matters observed by police officers and other law enforcement personnel." *See id.*

The Court employed a two-pronged test in resolving this issue: (1) whether the reports were objective, routine, scientific determinations of an unambiguous factual nature prepared by officials with no inherent motivation to distort the results, and (2) the adversarial context in which the relevant tests were conducted. *See id* at 809. Concluding that rule 803(8)(B) applied to prohibit the testimony of the chemists, the Court reasoned that the chemist were "law enforcement personnel" within the meaning of rule 803(8)(B) because they were important participants in the investigation and prosecution. *See id.* at 803. The Court concluded by noting that perhaps the most important factor in its determination lay in the reason for the reports' preparation; "the reports were not prepared for purposes independent of specific litigation, nor were they ministerial, objective observations of an unambiguous factual nature." *Id.* at 805.

Employing this two-pronged test, we will now analyze whether the trial court erred in admitting the probation officer's testimony. Appellant's probation file contains information that is objective and routine. Whether appellant failed to report to his probation officer in June 1996 is an unambiguous factual matter and is not an issue susceptible to any degree of subjectiveness by the probation officer. Furthermore, the nature of probation is rehabilitative; the records prepared by probation officers are not done in either an adversarial or investigative context. *See Garcia v. State*, 868 S.W.2d 337, 342 (Tex. Crim. App. 1993) (concluding that autopsy reports are not necessarily prepared in contemplation of litigation or in an adversarial context). Consequently, we hold that the probation file satisfies the requirements of rule 803(8)(B) because it does not constitute a matter observed by "other law enforcement personnel," and, therefore, was admissible.

Turning now to appellant's sufficiency challenge, we

first note that as an appellate court we are restricted in our review. The trial court is the exclusive judge of the credibility of the witnesses and determines whether the allegations in the motion to revoke are sufficiently demonstrated. *See Burke*, 930 S.W.2d at 232. Although we recognize the evidence is slim at best, we will not substitute our judgment for that of the trial court. Accordingly, we conclude there is sufficient evidence in the record to sustain the State's burden of proving by a preponderance of the evidence appellant's failure to report in June 1996. Therefore, appellant's sixth point of error is overruled.

Having found proof of a single violation of probation, we are compelled to affirm the trial court's order in revoking appellant's probation.

/s/ Leslie Brock Yates
Justice

Judgement rendered and Opinion filed July 29, 1999.

Panel consists of Justices Yates, Lee and Draughn,[5]

Publish——TEX. R. APP. P. 47.3(b)

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[5] Senior Justices Norman Lee and Joe L. Draughn sitting by assignment.

APPENDIX B

OFFICIAL NOTICE FROM COURT OF CRIMINAL
APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION ,
AUSTIN, TEXAS 78711

April 19, 2000
COA#: 14-97-00639-CR
RE: Case No. 2063-99
STYLE: GREER, JEFFREY MARTIN

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

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